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Note – Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery

Mary Elizabeth Keaney

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Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery

MARY ELIZABETH KEANEY*

Courts encourage settlement as a way to resolve disputes efficiently and clear congested dockets, but settlement agreements can have a sinister effect too. It is becoming common in modern litigation to draft settlement agreements that require the return of discovery materials and the sealing of court documents from public view. Legitimate privacy concerns warrant sealing pretrial discovery and other court documents. However, the practice of keeping information vital to the public health and safety sealed for a price is illegitimate, and should be prohibited.

Legislative efforts are being made to monitor the impact that secret settlement agreements have on public health and safety and to make the litigation process more transparent, but opponents have succeeded in blocking such legislation thus far. The primary objection raised by opponents to the Sunshine in Litigation Act and similar legislation is that there is a presumption of privacy for materials exchanged during pretrial discovery that is not filed with the court. Opponents rely upon a distinction between filed and unfiled discovery to support this presumption of privacy.

This Note demonstrates that such a presumption has no place in the debate over this legislation, and relies on a close examination of the history of the Federal Rules of Civil Procedure ("FRCP") for filing and discovery to unwrap the mistaken presumption advanced by the Judicial Conference and other opponents to the legislation. From the inception of the FRCP, there has been a public right of access to discovery materials, whether filed with the court or not. The advent of technology has resulted in voluminous document exchange in pretrial discovery. Any changes to the filing requirements were aimed at relieving the burden and expense associated with storing discovery information, and not intended to create a presumption of privacy for documents not filed with the courts.

* J.D. Candidate, University of California, Hastings College of the Law, 2011. Many thanks to my faculty advisor, Richard Zitrin, for sharing his expertise on this subject and his guidance in drafting this Note.

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INTRODUCTION

Many are familiar with the flurry of accidents resulting from separating tire treads on Bridgestone/Firestone tires in the 1990s. Accidents around the country resulted in serious injuries and fatalities to unsuspecting drivers, and ultimately, the company recalled over three million tires.¹ What most do not know is that Bridgestone/Firestone settled hundreds of cases involving the dangerous tires, many with secret settlement agreements, well before the public learned of the danger the tires posed.² If the court records from those settlement agreements had been available to the public, many lives might have been saved.

The legislature can safeguard the public from experiencing a similar tragedy in the future by enacting the Sunshine in Litigation Act.³ The Act was prompted by stories like the Bridgestone/Firestone recall, and dozens of other cases involving hazards and threats to public health where court documents were sealed from the public.⁴ There are numerous cases where the practice of agreeing to seal settlement documents that would otherwise be available to the public may result in additional fatalities, serious injuries, and illnesses. Aimed at eliminating this public danger, the Act asks judges to consider public health and safety before granting a protective order or sealing court records and settlement agreements.⁵ Judges are given the discretion to grant or deny secrecy based on a balancing test that weighs the public's interest in a potential public health and safety hazard against the parties' legitimate interests in secrecy.⁶

I. THE JUDICIAL CONFERENCE'S REPORTS

It might seem unlikely that legislation aimed at protecting the public in such a profound way would be met with rigorous dissent, but that is

1. Press Release, Bridgestone/Firestone Announces Voluntary Recall of 3.85 Million RADIAL ATX and RADIAL ATX II Tires, and 2.7 Million Wilderness AT Tires (Aug. 9, 2000), <http://usgovinfo.about.com/blfirestone.htm>; Press Release, Senator Herb Kohl, Kohl Introduces Bill to Protect Public Safety in Secret Court Settlements (Mar. 5, 2009), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2347 (reporting that over 250 people died in accidents related to the defective tires).

2. See Press Release, Senator Herb Kohl, *supra* note 1.

3. Sunshine in Litigation Act of 2009, S. 537, 111th Cong. (2009).

4. See S. Rep. No. 110-439, at 3-8 (2008) (listing numerous examples to show the impact of secret settlements on public health and safety, including Zomax, Zyprexa, Phenylpropanolamine (PPA), Bjork-Shiley heart valve, Dalkon Shield, silicone breast implants, Ephedra, "Park-to-Reverse" malfunction, side-saddle gas tanks, Cooper tires, all terrain vehicles, playground equipment, and portable cribs).

5. Sunshine in Litigation Act of 2009, H.R. 1508, 111th Cong. § 1660 (2009).

6. *Id.*

precisely what has occurred. The most recent hurdle to passing the proposed legislation comes from the Judicial Conference.

The Sunshine in Litigation Act of 2009 was introduced to the House of Representatives in March of 2009.⁷ The Act presents a proposed amendment to Rule 26(c) of the Federal Rules of Civil Procedure (“FRCP”) that is intended to “prohibit courts from shielding important health and safety information from the public as part of legal settlement agreements” and protective orders.⁸ Earlier in 2009, the Judicial Conference’s Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules⁹ were asked to consider the suitability of the Act.¹⁰ The Judicial Conference Committees ultimately opposed the bill on the grounds that it effectively amends the FRCP without engaging in the rulemaking process.¹¹ In addition to this procedure-based objection, the Judicial Conference Committees make three principal arguments in their opposition: First, the bill is unnecessary; second, it would impose an intolerable burden on the federal courts; and third, it would have significant adverse consequences on civil litigation, such as increasing cost and making it more difficult to protect important privacy interests.¹²

7. H.R. 1508, 111th Cong. (2009). Senator Herbert Kohl originally introduced the bill to the 103rd Congress as “a bill to amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.” Sunshine in Litigation Act of 1993, S. 1404, 103d Cong. (1993). It has been reintroduced annually since then, and while this Note was drafted, a revised version was before the House as H.R. 5419, the Sunshine in Litigation Act of 2010. H.R. 5419, 111th Cong. (2010). That bill was sponsored by Congressman Jerrold Nadler and represented an amended version of the Senate bill sponsored by Senator Kohl in 2009. See Sunshine in Litigation Act of 2009, S. 537, 111th Cong. (2009). The legislation was reintroduced to the 112th Congress by Congressman Nadler on February 9, 2011 as H.R. 592, the Sunshine in Litigation Act of 2011. H.R. 592, 112th Cong. (2011).

8. See Press Release, Senator Herb Kohl, *supra* note 1.

9. When discussed together, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules will be called the “Judicial Conference Committees.” References to the Judicial Conference Committees are in the present context and refer to the body opposing the Sunshine in Litigation Act. When discussed separately, I use the “Advisory Committee” to refer to the Advisory Committee on Civil Rules in place at the time of the revision to FRCP. The “Advisory Committee” in this context has no view on the Sunshine legislation. See *infra* Part IV.

10. When considering the proposed Act, the Judicial Conference Committee on Rules of Practice and Procedure worked in tandem with its Advisory Committee on Civil Rules. See *Sunshine in Litigation Act of 2009: Hearing Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 111th Cong. 55 (2009) [hereinafter *Hearing*] (prepared statement of Hon. Mark R. Kravitz, U.S. Dist. Court for the Dist. of Conn.).

11. *Id.* For an explanation of the rulemaking process, visit *The Rulemaking Process*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited Feb. 2, 2011).

12. *Hearing*, *supra* note 10, at 56 (prepared statement of Hon. Mark R. Kravitz). The Judicial Conference Committee on Rules of Practice and Procedure first articulated these objections in a prior review of the legislation. See *id.* S. 5419 was amended to address some of the objections. Interview with Richard Zitrin, Lecturer in Law, Univ. of Cal. Hastings, in S.F., Cal. (Mar. 22, 2010).

The Judicial Conference Committees' findings are not surprising. Numerous objections have been raised over the years to similar legislation. The principal objection espoused at the outset, and still relied upon today, is that an enhanced judicial responsibility to scrutinize protective orders and secret settlement agreements would burden an already overworked judiciary.¹³ Beyond considerations of judicial economy, opponents of the legislation also raise concerns about an undetermined threshold trigger for judicial oversight, a genuine need to protect trade secrets and other privacy considerations, lack of sufficient evidence to establish a widespread problem, and the chance that interference with party agreements will deter settlements.¹⁴ While some of these considerations have merit, others do not. When viewed in light of the larger principle that the courts have an overarching duty to protect the public interest, none of these considerations can overcome the need for implementing an enhanced scheme of judicial review for agreements implicating public health and safety.¹⁵ In fact, no single concern, or any of them collectively, adequately justifies the position that discovery materials are presumptively private.

There is a longstanding debate in the legal community about the scope of this problem and the need to find a solution for it. Proponents of legislation regulating conditioned settlement agreements believe that the justice system is meant to protect the public interest as a whole, not just the individual litigants in a particular case.¹⁶ Advocates for more transparency in the settlement process believe that when genuine threats to public health and safety are implicated, secret settlement conditions cannot be tolerated, ever.¹⁷ Further, these advocates understand that while there are legitimate reasons to enter into an agreement that requires the substantive information learned during discovery to remain confidential,¹⁸ those reasons are not always implicated when the courts are sanctioning protective orders and sealing court documents.

13. *Hearing*, *supra* note 10, at 61; *see also* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 23–27 (1983); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 487 (1991). The ABA also opposes enacting the legislation for similar reasons. *See Independence of the Judiciary: Sunshine in Litigation Act*, AM. BAR ASS'N, <http://www.abanet.org/poladv/priorities/sunshine/> (last visited Feb. 2, 2011).

14. These historical objections will be discussed briefly *infra* Part III.

15. Some oppose even this basic premise that the court system is in place not only to resolve individual disputes, but also to serve the public interest at large. *See* Marcus, *supra* note 13, at 63 (“The reality of civil litigation is that it ordinarily serves to resolve private disputes.”).

16. *See* Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1568 (2004); *see also* Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004); James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 875 (2004).

17. Interview with Richard Zitrin, *supra* note 12.

18. Examples of legitimate reasons include protection of trade secrets and genuine privacy

This Note will demonstrate that those opposed to transparency in litigation have relied heavily on a mistaken assumption that is critical to the viability of their position. The notion that information exchanged during discovery is presumptively private is not supported by a close examination of the history and evolution of the rules governing discovery. If this mistaken assumption is brought to light, this Note may inspire opponents to Sunshine in Litigation legislation to reconsider their views. Even if opponents are not entirely persuaded to change camps, an accurate recount of the state of modern discovery is still relevant to the debate.

II. ROAD MAP

Part III of this Note will first examine the historical objections to this kind of legislation and briefly address the arguments for and against those objections. Part IV will focus on the current and leading opposition asserted by the Judicial Conference and includes an analysis of the history of the rules governing the filing of court documents and the applicability of *Seattle Times Co. v. Rhinehart*¹⁹ as primary support for the Judicial Conference Committees' findings. Part V will suggest that this legislation properly targets the rules governing discovery, in particular, Rule 26(c) requests for protective orders. Part V also includes an analysis of the history of the rules governing discovery and the intended scope of the Act.

A. DOES THE PUBLIC HAVE A RIGHT TO ACCESS DISCOVERY MATERIALS?

A threshold inquiry into this issue revolves around the public's right to access information exchanged during pretrial litigation. Litigation takes place in a public forum. It primarily serves the purpose of resolving disputes between parties, but also encompasses a higher purpose of instilling confidence in the role of the judiciary as a protector of the public interest.²⁰ Accordingly, the use of discovery in the name of accountability to the public at-large is in line with the scope of the judiciary's role to protect the public interest.

Even opponents to transparency in litigation concede that there are exceptions to a blanket prohibition of public access to unfiled discovery materials. One commentator contends that "any use of discovery materials except to prepare for trial is inappropriate."²¹ However, the

interests for minors. I will discuss this topic further *infra* Part III.

19. 467 U.S. 20 (1984).

20. Zitrin, *supra* note 16, at 1568.

21. Marcus, *supra* note 13, at 7. Professor Marcus presents this statement in an article exploring protective orders and the public's right to information obtained in discovery. *See id.* at 5.

same commentator also concedes that there are notable exceptions to this principle, including when

(1) the information is needed as evidence in other litigation; (2) the information formed the basis of a pretrial ruling on the merits and access is necessary to permit evaluation of that ruling; or (3) in extremely rare cases, the subject of the litigation is alleged governmental misconduct, and there is a strong public interest in access.²²

These exceptions are often implicated in cases where the Sunshine legislation would prevent the sealing of discovery materials and easily fit into the underlying policy of protecting the public interest. Beyond the role of the judiciary as a protector of the public interest, the discussion that follows makes clear that the drafters of the Rules themselves contemplated a presumption of transparency in discovery.

B. PRIVACY RIGHTS IN DISCOVERY: THE MISTAKEN ASSUMPTION

Opponents to the legislation rely on a “longstanding recognition that while there is no public right of access to information exchanged between litigants in discovery, there is a presumptive public right of access to information that is filed in court and used in deciding cases”²³ to explain the committee’s opposition to the Sunshine legislation. Opponents rely on this division between filed and unfiled information to justify the extension of greater privacy rights for information exchanged during litigation that is not filed with the court.²⁴ This Note will demonstrate that such an extension is misplaced. Instead, the actual motivation for restricted discovery filing requirements in the Rules stems from attempts to curb undue expense in discovery and to address limitations related to storage capacity. In fact, the filing requirements have no connection to privacy rights of individual litigants. Privacy interests are addressed by the discovery rule governing protective orders.²⁵ Therefore, any presumption of privacy in unfiled discovery is mistaken and does not represent an explicit policy choice to preserve privacy at the discovery stage. Rather, it is an unintended consequence of the amendments made to the rules governing filing requirements.²⁶

22. *Id.* at 73.

23. Memorandum on Behalf of the Judicial Conference’s Comm. on Rules of Practice and Procedure & the Advisory Comm. on the Rules of Civil Procedure, Comments on Additional Language Proposed for H.R. 1508 (Nov. 2009) (on file with the Author) [hereinafter Comments on Additional Language Proposed for H.R. 1508]; see also *Hearing, supra* note 10, at 59–60 (prepared statement of Hon. Mark R. Kravitz) (recognizing a general rule that what is produced in discovery is not public information).

24. Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 354–55 (2006).

25. FED. R. CIV. P. 26(c).

26. See FED. R. CIV. P. 26–37.

III. THE HISTORICAL DEBATE OVER THE SUNSHINE IN LITIGATION ACT

Before addressing the current iteration of opposition to the Sunshine in Litigation Act in more detail, it is vital to understand the historical objections to transparency in pretrial litigation that remain part of the debate over this legislation.

A. THERE IS NO WIDESPREAD PROBLEM WORTHY OF JUDICIAL REFORM

From the outset, opponents to any form of secret settlement or protective order oversight have denied that a problem even exists.²⁷ They argue that there is no empirical evidence showing that sealed settlements or stipulated protective orders are a problem warranting remedy. “[T]he number of cases that conceivably could contain information that has any bearing on public health or safety is minuscule compared to the corpus of litigation in this country.”²⁸ This position was reinforced when the Federal Judicial Center (“FJC”) released reports on protective orders and settlement agreements, in 1996 and 2004 respectively.²⁹ The Advisory Committee had called for these studies in response to pending litigation and concerns over abuses involving protective orders and sealed settlements.³⁰

In the 1996 study, the FJC conducted research on protective orders and found that “there is no evidence that protective orders in fact create any significant problem in concealing information about public hazards”³¹ The FJC’s 2004 study addressed similar concerns related to abuses involving sealed settlement agreements filed in federal district courts and made similar findings. The study focused on how often and under what circumstances settlement agreements were sealed and found that secret settlements account for less than one half of one percent of cases, and that in those cases, generally “the only thing kept secret by the sealing of a settlement agreement is the amount of the settlement.”³² Both studies have historically been cited by opponents to this kind of legislation to support the conclusion that, in light of the relatively small percentage of cases that implicate conditioned settlement agreements

27. Miller, *supra* note 13, at 432.

28. *Id.* at 477.

29. See ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (2004); ELIZABETH C. WIGGINS, ET AL., FED. JUDICIAL CTR., PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS (1996).

30. Letter from Paul V. Niemeyer, Judge, U.S. Court of Appeals for the Fourth Circuit, to Henry J. Hyde, Chairman, Comm. on the Judiciary, U.S. House of Representatives 1–2 (Mar. 23, 1998) (on file with the Hastings Law Journal); see *Hearing*, *supra* note 10, at 63–64 (prepared statement of Hon. Mark R. Kravitz) (1996 report); *id.* at 66–67 (2004 report).

31. Letter from Paul V. Niemeyer, *supra* note 30, at 2; see also WIGGINS ET AL., *supra* note 29, at 3 (finding that protective orders occurred in five-to-ten percent of cases in the districts the FJC surveyed).

32. REAGAN ET AL., *supra* note 29, at 8.

and protective orders, there is no need for legislation reforming the current practices.³³

Further scrutiny of the study itself easily defeats this argument. Because the settlement agreement study dealt only with filed agreements, the study overlooked a huge segment of cases relevant to this matter.³⁴ As most settlement agreements are not filed with the court, any data from this study are incomplete at best.³⁵

Further, at least a dozen well-known examples of the true and dramatic implications of secret settlements on public health and safety can be cited to show there is indeed a problem worthy of examination.³⁶ While secret settlements may account for only a small fraction of cases, and admittedly, citing to a dozen cases does not necessarily justify a sweeping overhaul of current judicial procedure, these numbers are deceiving.

The number of lives impacted in those named cases certainly justifies further exploration of this issue. In his tort reform article, Ross Cheit notes that at least one of the sealed settlement cases studied by the FJC concerned more than fifty claims and eighty-six victims.³⁷ This observation illustrates that the impact of a single case can be widespread despite the misleading implication of the FJC's statistical analysis.³⁸

The FJC also emphasized that in most sealed cases, the complaint is not sealed, giving the public access to party names and to the general allegations of wrongdoing.³⁹ Access to the complaint alone is inadequate. Too often, complaints make only general allegations, and the details of the controversy come out only after some discovery.⁴⁰ While the heightened pleading requirement for federal civil cases may alleviate this problem to a degree,⁴¹ it cannot be relied upon as the sole judicial

33. *Hearing*, *supra* note 10, at 67 (prepared statement of Hon. Mark R. Kravitz).

34. REAGAN ET AL., *supra* note 29, at 3.

35. Memorandum from the Am. Ass'n for Justice (Mar. 6, 2009) (on file with the Hastings Law Journal). The memorandum points out other flaws in the reports:

First, when documents and settlements are sealed, often the fact that they were sealed is also sealed. As the FJC found, in some cases the entire case file, including complaint, was sealed with no explanation. Second, it was a very limited study that only looked at cases disposed of in 54 of the 94 judicial districts during a one-year period from 2000 to 2001.

Id.

36. See S. Rep. No. 110-439, at 3-8 (2008).

37. Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 243 n.47 (2008) (discussing the sexual abuse scandal that permeated so much of the Catholic church).

38. *Id.* at 241-42 (noting that the 2004 FJC study included a sample from just over half of the federal districts, fifty-two out of ninety-four, thereby weakening the strength of the analysis).

39. REAGAN ET AL., *supra* note 29, at 8.

40. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 586 (2007) (Stevens, J., dissenting) ("[I]n antitrust cases . . . 'the proof is largely in the hands of the alleged conspirators[]'" (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976)) (internal quotation marks omitted)).

41. See *id.* at 556 (majority opinion) (holding that plaintiffs must include enough facts in their

mechanism to ensure public access to information relevant to public health and safety.

B. EVEN IF THERE IS A PROBLEM, THE PROPOSED SOLUTION INFRINGES ON EXISTING RIGHTS

Moving forward under the assumption that the scope of the problem is broad enough to warrant further consideration, opponents raise other hurdles to the successful implementation of a solution. One such hurdle is the notion that corporations have a legitimate expectation of privacy in their business operations and trade secrets.⁴² This is often the justification for issuing protective orders in products liability and tort cases⁴³—as it should be when those interests are legitimate. However, those legitimate interests are not always implicated when protective orders and sealed settlement agreements are involved.

Interests of public health and safety must trump any privacy interests of litigants, even when trade secrets are involved.⁴⁴ “[T]here is no legitimate need to protect a product or service that hurts people. If it is a defective product, there is no trade secret to protect—*no one* is going to copy that design.”⁴⁵ Requiring the courts to review protective orders and to balance the competing interests of the parties with the overall interest of the public at large is the proper approach in this regard.

C. FRCP 26(c) ALREADY ADDRESSES THE PROBLEM

Tangential to the privacy argument is the notion that Rule 26(c) already adequately addresses this issue. The argument is that “courts review motions for protective orders carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings.”⁴⁶ Therefore, imposing more responsibility on the courts is unwarranted and cannot be justified in light of the increased costs, time, and burden. But what about stipulated protective orders, or when a motion is not carefully reviewed with an eye toward public health and safety implications? Stipulated orders save time and promote judicial efficiency. While the judiciary surely does not intend to

complaints to make it plausible, not merely possible or conceivable, that they will be able to discover facts supporting their claims); *see also* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (holding that the *Twombly* test applies to all complaints, not only those in antitrust cases).

42. Miller, *supra* note 13, at 470.

43. *See* Zitrin, *supra* note 16, at 1590.

44. Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 887 (2004).

45. Zitrin, *supra* note 16, at 1590.

46. *Sunshine Litigation Bill Unnecessary*, THE THIRD BRANCH (Sept. 1 2008), http://www.uscourts.gov/News/TheThirdBranch/08-09-01/Sunshine_Litigation_Bill_Unnecessary.aspx; *see also* William A. Ruskin, *When a Little Sunshine May Cause a Burn*, TOXIC TORT LITIG. BLOG, (Apr. 22, 2009, 11:03 AM), <http://www.toxictortlitigationblog.com/articles/sunshine-in-litigation-act-of/>.

skimp when reviewing party motions, given the sheer volume of papers that pass through chambers, it is plausible that some party motions will be granted without first considering the impact on public health and safety. The Sunshine in Litigation Act addresses these gaps in existing procedure by putting public health and safety at the forefront when considering requests to seal information, stipulated or otherwise.⁴⁷

D. CONSIDERATIONS OF JUDICIAL ECONOMY

Finally, opponents to transparency point to an already overburdened judiciary and suggest that adding another time-consuming task will only exacerbate the problem.⁴⁸ This is a legitimate concern. Some suggest private alternative dispute resolution as an alternative to litigation but acknowledge that there are significant adverse consequences to privatizing dispute resolution.⁴⁹ Others find that the judiciary can accommodate this procedural change. Judge Joseph Anderson Jr., of the United States District Court for the District of South Carolina, is a principal actor in the effort to ban secret settlements all together and is not swayed by this proposition.⁵⁰ In fact, Judge Anderson argues that transparency in discovery will foster judicial economy because parties litigating similar issues will not have to reinvent the wheel every time if they are granted access to discovery materials.⁵¹ Further, once the legislation has been implemented by the courts, “workloads [will] return to normal as litigants learn of the futility of seeking improper protective orders—and the possibility of sanctions for requesting such orders in bad faith.”⁵²

Other popular objections include that more cases will be filed due to copycat litigation, that cases will not settle, or that cases will settle too quickly. These have all been addressed in other legal scholarship, and I will not reiterate those arguments here.⁵³ The overarching point is that despite legitimate concerns about the courts’ capacity to implement the proposed legislation, such concerns cannot outweigh the courts’ critical function of protecting the public interest. An increased burden on the courts cannot quell the need for a solution when there are threats to public health and safety involved.

47. H.R. 1508, 111th Cong. § 1660 (2009).

48. See *supra* note 10 and accompanying text.

49. See Cheit, *supra* note 37, at 281–83.

50. Zitrin, *supra* note 16, at 1582.

51. Anderson, *supra* note 16, at 743–46.

52. Zitrin, *supra* note 16, at 1591.

53. See generally Rooks, *supra* note 16, at 863–65 (describing arguments over secrecy in litigation).

IV. THE CURRENT DEBATE OVER THE SUNSHINE IN LITIGATION ACT

While some of the arguments discussed above remain active in the debate over enacting the Sunshine in Litigation Act, an alternative focus has shifted toward privacy in the pretrial phases of litigation.

A. PRIVACY RIGHTS IN DISCOVERY: THE MISTAKEN ASSUMPTION

As mentioned earlier, opponents to the legislation mistakenly rely on a belief that there is no presumptive right of access to information that is filed in court to explain the Judicial Conference Committees' opposition to the proposed legislation.⁵⁴ Opponents use this misplaced division between filed and unfiled information to justify the extension of greater privacy rights to information exchanged during litigation that is not filed with the court. However, the true motivation for restricted discovery filing requirements can be found in a careful review of the revisions and amendments to the FRCP over the past several decades.

1. *A Brief History of Rule 5: Serving and Filing of Pleadings and Other Papers*

Rule 5 of the FRCP governs the serving and filing of pleadings and other papers with the court.⁵⁵ According to Wright and Miller, as explained in *Federal Practice and Procedure*, Rule 5 serves two purposes: (1) ensuring the exchange of all written communication to all parties in the litigation, and (2) creating an "orderly court record for each case."⁵⁶ Further, the treatise explains that changes to Rule 5 over the years have been a "response[] to advances in information technology[,] and . . . have sought to reduce the burdens on counsel and the courts."⁵⁷

a. *Early Amendments*

The 1970 amendments to the FRCP in general, and Rule 5 in particular, are central to this discussion. Before 1970, Rule 5 did not explicitly include discovery materials in the filing requirements, but instead made reference only to notices and demands.⁵⁸ In 1970, the FRCP were amended to emphasize that the requirement included discovery materials, such as answers or responses pursuant to Rules 33, 34, and 36.⁵⁹ More precisely, Rule 5(a) was amended to include the filing of "every paper relating to discovery required to be served upon a party unless the

54. Comments on Additional Language Proposed for H.R. 1508, *supra* note 23; *see also* Hearing, *supra* note 10, at 59 (prepared statement of Hon. Mark R. Kravitz) (recognizing a general rule that what is produced in discovery is not public information); discussion *supra* note 9.

55. FED. R. CIV. P. 5.

56. 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1141, at 411 (3d ed. 2002).

57. *Id.* § 1142, at 412.

58. FED. R. CIV. P. 5 (1970) advisory committee note; 12A CHARLES WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* app. c, at 125 (2010 Appendices).

59. FED. R. CIV. P. 5 (1970) advisory committee note; 12A WRIGHT ET AL., *supra* note 58.

court otherwise orders.”⁶⁰ In fact, “Rule 5(d) is not intended to curtail any third-party access to pretrial discovery documents, but only to alleviate the courts’ ‘serious problems of storage.’”⁶¹ The change was in keeping with the original intent of the Rule: to ensure full exchange of information among parties and the court.

Later, due to the changing nature of discovery in the modern era, a revision to Rule 5 restricted the filing requirement by allowing the lower courts “to order that discovery materials not be filed unless requested by the court or by the parties.”⁶² The Advisory Committee at the time explained that the “added expense and the large volume of discovery filings present[ed] serious problems of storage,” prompting the 1980 amendment of the Rule.⁶³

However, change did not come easily. The first proposed revision, in 1978, ignited controversy about the scope and necessity of this approach to solve problems related to expense and storage.⁶⁴ In fact, this revision would have *eliminated* the requirement to file discovery materials not used in a proceeding.⁶⁵ However, in light of the controversy, a compromise was reached. Because “such materials are sometimes of interest to those who may have no access to them except by a requirement of filing,” the 1980 amendment retained the filing requirement, while giving local courts discretion to authorize court orders that excuse filing if necessary in their district.⁶⁶ The Advisory Committee explicitly stated that the change was directed at managing the expense and the associated burden that comes with modern litigation, not at denying public access.⁶⁷

Even with this tempered amendment in place, the 1980 amendment continued to fuel controversy. There was a great deal of concern with

60. FED. R. CIV. P. 5(a) (1970).

61. 4B WRIGHT & MILLER, *supra* note 56, § 1152, at 462 n.5 (citing *In re Consumers Power Co. Secs. Litig.*, 109 F.R.D. 45, 50 (E.D. Mich. 1985)). *But see* *United States v. Vazquez*, 31 F. Supp. 2d 85, 91 (D. Conn. 1998) (finding that documents that play no role in performance of Article III functions, such as discovery documents passed between parties, are not presumed to be public). In *Vazquez*, the court referenced *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), but acknowledged an analogous contradictory proposition that “there is no presumptive *first amendment* public right of access.” *Vazquez*, 31 F. Supp. 2d at 91 (citing *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986)) (emphasis added).

62. 4B WRIGHT & MILLER, *supra* note 56, § 1152, at 462. The 1970 revision anticipated the increased burden on the courts due to voluminous papers and numerous parties, and empowered the court to “vary the requirement if in a given case [the filing requirement] proves needlessly onerous.” FED. R. CIV. P. 5 (1970) advisory committee note.

63. FED. R. CIV. P. 5 (1980) advisory committee note.

64. *Id.*

65. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622 (1978); 4B WRIGHT & MILLER, *supra* note 56, § 1142, at 417.

66. FED. R. CIV. P. 5 (1980) advisory committee note (emphasis added).

67. Am. Bar Ass’n, Second Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137, app. at 156–57 (1980).

respect to the court's newfound discretionary power to decide which materials must be filed and which need not.⁶⁸ This discretionary role was in direct conflict with the traditional view that discovery materials were considered public documents, open to the public once filed with the courts.⁶⁹ The prospect that some discovery might not be filed left open the possibility that information relevant to public health and safety could be shielded from public scrutiny. Some argued that orders waiving the filing requirement should be issued only when there was not a strong public interest involved, and that easing the discovery burden on the parties could not justify a filing waiver in such cases.⁷⁰ The debate set off by the amendment initiated thousands of pages of legal scholarship on the topic⁷¹ and the issue remains unsettled today.

b. Recent Amendments

Further changes to Rule 5 filing requirements did not greatly affect public access to court documents until the most recent amendment in 2000.⁷² After the 2000 amendments, Rule 5(d) read:

All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses *must not be filed until they are used in the proceeding or the court orders filing*: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.⁷³

The amended rule adopted the more restrictive approach previously abandoned in the 1980 amendment.⁷⁴ The rule now *prohibits* the filing of discovery materials unless it is used in a proceeding, or the court so orders. This new procedure results in a dramatic upheaval of the

68. 4B WRIGHT & MILLER, *supra* note 56, § 1152, at 462 n.6 (“[A *New York Times*] article characterized the change as giving federal judges ‘the power to prevent public access to a huge number of documents that now belong to the record.’” (quoting Editorial, *Paper Justice*, N.Y. TIMES, July 22, 1982, at A18)); *see also* Am. Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978) (“As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.”). *Grady* acknowledged that there is a split among the courts on the propriety of modifying protective orders to allow access to a nonparty, but ultimately allowed the discovery to be shared to avoid the “wastefulness of requiring [duplication of] analyses and discovery already made.” 594 F.2d at 597.

69. *See* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2042, at 221 (3d ed. 2010).

70. “Rule 5(d) embodies a concern that the general public be afforded access to discovery materials whenever possible, and that access particularly is appropriate when the subject matter of the litigation is of special public interest.” 4B WRIGHT & MILLER, *supra* note 56, § 1152, at 461–62 n.5 (citing *In re Agent Orange Prods. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987)).

71. *See, e.g.*, sources cited *supra* notes 13 & 16.

72. *See* 4B WRIGHT & MILLER, *supra* note 56, § 1142, at 417–18 (describing the series of changes).

73. FED. R. CIV. P. 5(d) (2000) (emphasis added).

74. *See* FED. R. CIV. P. 5 (2000) advisory committee note.

traditional notion that prelitigation discovery is presumptively open to the public.

The Advisory Committee made extensive comments related to this 2000 revision, but did not rest their policy choice on privacy interests in discovery exchange. Instead, the Advisory Committee explained that since the 1980 amendment, several local districts had adopted rules that either excused or forbid filing of discovery materials.⁷⁵ This resulted in a multiplicity of filing requirements from district to district.⁷⁶ Consequently, the 2000 amendments were aimed at eliminating inconsistent filing rules in different districts.⁷⁷ In addition to the goal of fostering uniformity of the FRCP, this Advisory Committee again focused on considerations of expense, burden, and storage capacity to account for this most recent change.⁷⁸

As mentioned earlier, the Judicial Conference Committees rely on the notion that there is no presumptive right of access to discovery not filed with the court to justify their opposition the legislation. Opponents use a division between filed and unfiled information to justify the extension of greater privacy rights to litigating parties. Historically, however, the Advisory Committees did not amend the filing rules to address privacy concerns. In fact, the current Judicial Conference Committees' position is in conflict with the historical motivations for rule changes as explained by the Advisory Committees at the time of those revisions. The true motivation for restricted discovery filing requirements can be found in a careful review of the revisions and amendments to the FRCP over the past several decades.

B. MISREADING *SEATTLE TIMES CO. v. RHINEHART*

To strengthen the argument that the Sunshine legislation would have minimal effect, Judge Kravitz, on behalf of the Judicial Conference Committees, cites to the landmark decision in *Seattle Times Co. v. Rhinehart*.⁷⁹ Just as he suggested that Rule 5 supported a presumption of privacy in discovery, Judge Kravitz suggests that the Supreme Court has affirmed the general rule that "what is produced in discovery is not public information"⁸⁰ by quoting a portion of the case. The relevant passage in *Seattle Times* reads as follows: "Moreover, pretrial depositions

75. *Id.*

76. *Id.*

77. The 2000 amendment explicitly supersedes and invalidates the local rules. *Id.*

78. *Id.*

79. *Hearing*, *supra* note 10, at 59–60 (prepared statement of Hon. Mark R. Kravitz) (relying on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).

80. Comments on Additional Language Proposed for H.R. 1508, *supra* note 23; *see also Hearing*, *supra* note 10, at 59 (prepared statement of Hon. Mark R. Kravitz); *see Marcus*, *supra* note 24, at 332 (arguing that this comment alone should effectively end the debate surrounding public access to discovery materials).

and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.”⁸¹ At first blush, this passage seems relevant to Judge Kravitz’s position, but when placed in context, this passage does not support Judge Kravitz’s theory. In fact, it undermines it.

First, the opinion cites to *Gannett Co. v. DePasquale*, a case dealing with the media and a public right of access to criminal pretrial hearings,⁸² an issue that is wholly irrelevant to the public right of access to discovery exchanged during civil litigation. Second, even if *Gannett* were relevant, as discussed earlier, the FRCP were enacted to expand the scope of discovery in direct response to the restrictive common law approach.⁸³ Citing to the former procedure under common law ignores the critical and fundamental purpose of the rules to modernize litigation procedure, regardless of the common law approach. Of course, the current scope of discovery is more liberal than it was at common law—a chief purpose of enacting the FRCP from their inception in 1938.⁸⁴

Further, the passage in *Seattle Times* that supposedly recognizes the limits of the public right of access to discovery materials has an extensive footnote describing the evolution of the filing requirements for discovery. The footnote does not serve to fortify the theory articulated by Judge Kravitz. Instead, it bolsters the position this Note takes: that discovery is presumptively public, and it is the amendments to the filing Rules that have inadvertently undermined this presumption.

The footnote states that “[d]iscovery rarely takes place in public.”⁸⁵ This is indeed the customary practice in modern litigation. Depositions and interrogatories are nearly always conducted or answered in private settings. However, it is important to distinguish common practice from an intentional policy choice. The footnote goes on to say that the “Rules of Civil Procedure *may* require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts.”⁸⁶ As discussed earlier, each district was given discretion to limit the amount of information filed with the court in response to concerns about storage, expense, and discovery abuse generally. Hence, while the common practice is inherently private, that does not mean it is presumptively so. By ignoring the fundamental

81. 467 U.S. 20, 33 (1984) (citation omitted) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 (1979)).

82. 443 U.S. 368, 370–71 (1979).

83. See Marcus, *supra* note 13, at 6; Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817, 828–32 (2007) (“The adoption of the FRCP in 1938 marked a new approach and epoch.”).

84. Moskowitz, *supra* note 83, at 828–32.

85. *Seattle Times*, 467 U.S. at 33 n.19.

86. *Id.* (emphasis added).

motivation behind the amendments, it is easy to see how the effect of the amendments can be misconstrued. It is true that “the extent that courthouse records could serve as a source of public information . . . is subject to the control of the trial court,”⁸⁷ but not because of a policy choice to limit public access in favor of privacy concerns.⁸⁸ This interpretation of the amendments to the filing requirements and the realities of modern discovery practice must be corrected.

C. THE EFFECTS OF RULE 5 AMENDMENTS

The changes to Rule 5 have had an unintended effect that has created a significant problem. Rule 5, as amended, is easily manipulated to conceal discovery information that ought to be accessible to the public. The process of hiding discovery can take many forms, but most common and most devious is the secret settlement agreement.

1. *Fashioning Secrecy: How Parties Evade Review*

It is now common practice in modern litigation for parties to agree upon settlement conditions requiring confidentiality for certain aspects of the agreement.⁸⁹ In addition to keeping the amount of settlement secret, these agreements often require a discovering party to return discovery materials to the disclosing party and to remain silent about information learned during the prelitigation discovery process.⁹⁰ Some of this information is of vital interest to the public but is no longer accessible to the public due to the changes to the filing requirements in Rule 5.

2. *Understanding Settlement Agreements*

Conditioned settlement agreements are increasingly implicated in litigation that arises when a person is injured, physically or otherwise, by the product or practice of another.⁹¹ This type of litigation proceeds like any other. First, the injured party brings suit to seek redress for an injury by asserting general allegations of wrongdoing in the complaint. Complaints without merit are dismissed, but all others move forward in the litigation process. Even then, most cases do not go all the way to

87. *Id.*

88. Comments on Additional Language Proposed for H.R. 1508, *supra* note 23; *see also* Hearing, *supra* note 10, at 59 (prepared statement of Hon. Mark R. Kravitz).

89. *See* Moskowitz, *supra* note 83, at 819 n.8 (describing an attorney who reported that he had not entered into a settlement agreement without a confidentiality clause in over five years).

90. *See* Cheit, *supra* note 37, at 256; Rooks, *supra* note 16, at 860. *But see* REAGAN ET AL., *supra* note 29, at 7 (finding that, in general, the only thing kept sealed by the sealing of a settlement agreement is the amount of the settlement).

91. Of the cases cited in the FJC Report, 503 “were categorized as ones ‘that might be of special public interest,’ involving environmental harm, products liability, sexual abuse, and those with a public party as defendant.” *See* Memorandum from the Am. Ass’n for Justice, *supra* note 35 (quoting REAGAN ET AL., *supra* note 29, at 8 tbl.2).

trial.⁹² Instead, after some discovery is exchanged, parties usually negotiate a settlement agreement.⁹³

The courts encourage settlements. By definition, a settlement is “an agreement that ends a dispute and results in the voluntary dismissal of any related litigation.”⁹⁴ Parties are generally permitted to draft the terms of settlement agreements without judicial involvement.⁹⁵ With respect to public access to court documents, this is where the system breaks down. First, the vast majority of settlement agreements are not filed with the court.⁹⁶ Even if a settlement agreement is filed with the court, it is not required to receive scrutiny from the courts. In fact, the court has no right to review a settlement agreement unless it is on behalf of a minor, incompetent, trustee, or class.⁹⁷ Because the courts are not permitted to review and approve the terms of the agreement, information that can pose a significant danger to public health and safety can be easily concealed. This restrains the court even if it wants to intervene on behalf of the public.⁹⁸

If parties could be trusted to place the public interest on par with the interest of individual litigants, the Sunshine in Litigation Act would not be needed. However, parties are motivated to hide damaging information because the cost of widespread repair is perceived as too great in comparison to the cost of individual litigation on an ad hoc basis.⁹⁹ In turn, the choice between these two options has the tendency to inflate the settlement amount offered to the plaintiff in an individual action because silence is seen as a commodity.¹⁰⁰

Even parties who may otherwise wish to expose the dangerous practice or product in open litigation proceedings may agree to inflated

92. See, e.g., REAGAN ET AL., *supra* note 29, at 1.

93. See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 691 & n.43 (2005) (“[L]arge numbers of cases filed in federal or state court are now resolved through ADR, and especially settlement.”). See generally John Barkai et al., *A Profile of Settlement*, 42 CT. REV.: J. AM. JUDGES ASS’N 34 (2006).

94. *Settlement*, LEGAL INFORMATION INSTITUTE, <http://topics.law.cornell.edu/wex/settlement> (last visited Feb. 2, 2011).

95. See *infra* note 97. Only settlement agreements under FRCP 23 require court approval. See Barkai et al., *supra* note 93, at 1 (“[A]ccurate empirical data about settlement rates does not exist.”).

96. REAGAN ET AL., *supra* note 29, at 1 (“Usually such agreements are not filed. A high proportion of civil cases settle, but a sealed settlement agreement is filed in less than one-half of one percent of civil cases.” (footnote omitted)).

97. *Id.*; see FED. R. CIV. P. 41(A)(1). An action may be voluntarily dismissed by the plaintiff without a court order if stipulated or sought prior to the defendant’s filing of an answer or motion for summary judgment. See FED. R. CIV. P. 23 (requiring court approval for settlements on behalf of a class); *In re Peanut Corp. of Am.*, No. 6:10CV027, 2010 U.S. Dist. LEXIS 91402, at *20 (W.D. Va. Aug. 25, 2010) (discussing rules related to settlement agreements on behalf of minors).

98. Anderson, *supra* note 16, at 715.

99. Interview with Prof. Richard Zitrin, *supra* note 12; see Zitrin, *supra* note 16, at 1567–68.

100. See Zitrin, *supra* note 16, at 1565–66 (describing a segment on the television show 60 Minutes II).

settlement offers partially for the money, but also because it offers prompt resolution to an otherwise arduous process.¹⁰¹ When faced with the choice between quick settlement and years of litigation, it is simply easier for some plaintiffs to choose the speedy and lucrative solution.¹⁰² Thus, in the hands of two private parties that agree to these settlement conditions, known dangers to public health and safety can go unchecked for years.¹⁰³

3. *Other Mechanisms Resulting in Secrecy: Protective Orders*

Parties have manipulated other judicial mechanisms to limit transparency in the litigation process. Stipulated or umbrella protective orders, contracts separate from the settlement agreement created to avoid court scrutiny, pseudonyms, sealed documents, and returned or destroyed discovery are all tactics that are frequently used to accomplish the same end as conditioned settlements.¹⁰⁴ As a result of these practices, the public often learns about the dangers to public health and safety many years, and many victims, after the first suit is brought.¹⁰⁵

Protective orders are by far the most common mechanism used for protecting privacy interest and are, therefore, the proper target of legislation aimed at regulating secret settlements. Protective orders serve a legitimate purpose: The procedural device is in place to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹⁰⁶ However, protective orders have also become a mechanism for preventing public access to information vital to public health and safety. Courts are required to review protective orders before they are enforceable.¹⁰⁷ Nevertheless, orders undergo far less judicial scrutiny when both parties stipulate to them.¹⁰⁸ The rationale for the limited scrutiny is that if both parties agree to the terms, there is little need for an overworked judiciary to interfere.¹⁰⁹ This reasoning fails to consider the possibility that both parties might have an incentive to stipulate to secrecy during the litigation because it can be used as a leverage point for settlement agreements.¹¹⁰ Thus, in the interest of

101. *See id.* (detailing the story of Kim Van Etten, whose son died in a car accident, and her decision to accept a settlement requiring her to keep secret both the amount of settlement and documents discovered during litigation).

102. *Id.*

103. *See id.* at 1573–75 (detailing media publicity bringing to light secret settlements behind Firestone shredding tires, Zomax related deaths, and General Motors, among others).

104. *See* Cheit, *supra* note 37, at 234, 256.

105. *Id.* at 232–33 (citing examples of tragedies that could have been averted if the defects or dangers were available to the public sooner).

106. FED. R. CIV. P. 26(c)(1).

107. FED. R. CIV. P. 26.

108. *See* Marcus, *supra* note 13, at 2.

109. *Id.*

110. This is also true for settlement agreements. Anderson, *supra* note 16, at 730–31.

reinforcing the courts' role as a protector of the public interest, all protective orders should undergo thorough scrutiny, even when both parties stipulate the order. The Sunshine in Litigation Act addresses these tactics and gaps in the current procedure. In addition to requiring the courts to determine whether issues of public health and safety are implicated in settlement agreements, the Act requires a similar inquiry before a protective order may be issued.¹¹¹ The legislation applies to both stipulated orders and to those unilaterally requested.

V. WHY THE SUNSHINE IN LITIGATION ACT IS A NECESSARY NATIONAL MANDATE

It not altogether surprising that when parties' lawyers are left to their own devices, they will often choose secrecy over disclosure in order to protect their clients' interest. This choice is in line with the duty to zealously advocate for a client.¹¹² But when no one is watching, people tend to make poor choices. The choice to condition settlement upon secrecy can have a dramatic impact well beyond the bounds of individual litigation, affecting the health and safety of thousands of people.

The court should play a chief role in the adoption of such agreements when matters of concern to public health and safety are implicated. The courts took an active role in curbing other forms of discovery abuse beginning the 1970s.¹¹³ Now, faced with a new form of discovery abuse, it is appropriate to look to the courts to guard against secrecy abuses too.

Unfortunately, courts have neither the time nor the inclination to review the substantive information that is the basis for secret settlement agreements and its potential impact on public health and safety. The already demanding workload that most jurisdictions endure precludes voluntary adoption of the procedures embodied in the proposed legislation.¹¹⁴ Because the courts are not equipped to voluntarily take on

111. Sunshine in Litigation Act of 2009, S. 537, 111th Cong. § 1660(a)(1)(B)(i) (2009) ("A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that . . . the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question . . .").

112. Zitrin, *supra* note 16, at 1594 ("[A]ttorneys believing it to be in their client's economic interests to enter into a secrecy agreement will simply do so; their perceived duty of advocacy will trump any possibility of disclosing . . .").

113. Moskowitz, *supra* note 83, at 832 ("Since 1970 . . . [t]he thrust of the amendments to the federal rules . . . has been toward containing cost and time expended on the exchange of pretrial information."); *see also infra* notes 129–34 and accompanying text.

114. Alan F. Blakely, *To Squeal or Not to Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65, 74 (2003) ("If the parties desire confidentiality [sic] and present such a request to the court, what incentive does the court have to

more responsibility, the need for legislative reform mandating the judiciary to take an active role in the creation and approval of secret settlement agreements and protective orders is even more crucial. Without mandated intervention, local courts could address this problem in myriad ways, with varying levels of scrutiny, resulting in fractured outcomes that depend upon the jurisdiction in which the case is tried. Thus, in an era of national litigation, forum shopping may become an obstacle if the legislation is not implemented at a national level.¹¹⁵

A. THE RULES GOVERNING DISCOVERY

The legislation properly targets Rule 26(c), the protective order provision, to remedy the abuses stemming from changes to the filing requirements. Parties with legitimate privacy considerations should continue to utilize this Rule to keep discovery information confidential. However, parties with improper motives for concealing settlement agreements and seeking protective orders must be stopped.

From the creation of the FRCP in 1938 through the 1970s, the focus of the rules governing discovery was on liberalizing discovery procedures.¹¹⁶ The rules were crafted with the expansive concepts of equity in mind, which resulted in broad discovery practice from the outset.¹¹⁷ After 1970, the focus of the rules governing discovery shifted “toward containing cost and time expended on the exchange of pretrial information.”¹¹⁸

In addition to amending Rule 5, as described above, the 1970 amendments also restructured the rules governing discovery in order to create one rule addressing the scope of discovery generally.¹¹⁹ This rule was designated Rule 26, which had previously governed only depositions.¹²⁰ Prior to the restructuring, the discovery rules were separate and self-contained.¹²¹ Therefore, any prior amendment made to the rules governing discovery occurred on an ad hoc basis and was

analyze the order? . . . Given the busy court dockets and the court’s desire that parties manage their own discovery, should courts be expected to add to this duty to their already overburdened load?”).

115. Forum shopping occurs when multiple courts have concurrent jurisdiction over a plaintiff’s claims, and the plaintiff chooses the court that will treat his or her claims most favorably. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72–76 (1938) (describing litigants in cases with diversity jurisdiction moving suits to different federal courts to benefit from the laws of the forum state).

116. *See* Moskowitz, *supra* note 83, at 831; *see also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 *TUL. J. INT’L. & COMP. L.* 153, 159–61 (1999).

117. *See* Marcus, *supra* note 116, at 158.

118. Moskowitz, *supra* note 83, at 832; *see also* Marcus, *supra* note 116, at 164–65.

119. *See* Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 *F.R.D.* 487, 490 (1970).

120. *Id.*

121. *Id.*

incorporated by reference through other rules.¹²² Due to the nature and complexity of the 1970 amendments, and predictions about future amendments, the restructuring was considered a necessary and convenient way to organize the rules governing discovery.¹²³

I. Rule 26(c) Protective Orders

Particularly relevant to this discussion is Rule 26(c), which governs the procedure for obtaining protective orders.¹²⁴ The Rule “empowers the court to make a wide variety of orders for the protection of parties and witnesses in the discovery process.”¹²⁵ The understanding that “parties engaged in litigation do not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit” is a strong foundation for the Rule.¹²⁶ “But there remains a concomitant principle favoring full, fair, and open disclosure of the important matters occurring [in] the public’s courts.”¹²⁷ These guiding principles are pivotal in understanding the essence of Rule 26(c) and its relationship to the other discovery rules. In fact, the 1970 Advisory Committee commentary notes that changes were made to clarify the Rule and to “avoid any possible implication that a protective order . . . may not safeguard against ‘undue burden or expense.’”¹²⁸

Along with focusing on the added expense and storage of filed documents, discovery abuse was a genuine concern in the 1970s.¹²⁹ In fact, the Special Committee for the Study of Discovery Abuse was charged with examining the FRCP to find ways to “reduce both the excessive cost and unnecessary delay” associated with established discovery abuses.¹³⁰ With the aim of curbing discovery abuse and controlling time and cost expenditures, many amendments have been made over the last few decades to the rules governing discovery.

122. *Id.* (“From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34.”). Protective orders are “directly applicable to all forms of discovery.” 8A WRIGHT ET AL., *supra* note 69, § 2035, at 142; *see also* 12A WRIGHT ET AL., *supra* note 58, app. c, at 289.

123. *See* Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. at 490 (“Proposals of a similar nature will probably be made in the future.”).

124. FED. R. CIV. P. 26(c). Prior to 1970, this was codified as Rule 30(b). *See* FED. R. CIV. P. 26 (1970) advisory committee note.

125. 8A WRIGHT ET AL., *supra* note 69, at 141.

126. *Id.* (quoting *In re Mirapex Prods. Liab. Litig.*, 246 F.R.D. 668, 672–73 (D. Minn. 2007)).

127. *Id.* (quoting *Mirapex*, 246 F.R.D. at 672–73).

128. FED. R. CIV. P. 26(c) (1970) advisory committee note.

129. The Special Committee for the Study of Discovery Abuse notes several examples of “discovery abuse” that prompted their study, including unnecessary discovery, improper withholding of discoverable information, and misuse of discovery procedures such as excessively burdensome interrogatories. Am. Bar Ass’n, Second Report for the Special Comm. on Abuse of Discovery, 92 F.R.D. 137, 138, 147 (1980).

130. *Id.* at 137.

Beginning in 1983, the Advisory Committee sought to “enhanc[e] judicial responsibility to oversee litigation, with special emphasis on discovery and sanctions for litigation misconduct.”¹³¹ Changes to judicial responsibility include requiring discovery conferences, requiring signatures on discovery requests, directing judges to curtail disproportionate discovery, and permitting judges to order time limits on discovery.¹³²

Later, in 1993, the FRCP were again amended to reinforce the intended restraint on discovery by “impos[ing] numerical limits on depositions and interrogatories[,] . . . imposing a moratorium on formal discovery until the parties had met and fashioned a discovery plan . . . [and creating the] ‘initial disclosure’ duty”¹³³ But, as with the optional Rule 5 amendments of the same era, courts did not have to conform to this national scheme thus resulting in a lack of uniformity in the application of discovery rules, prompting the 1996 amendments.¹³⁴ Notably, all of these revisions to the discovery rules focused on other subdivisions. Rule 26(c) has remained relatively the same since the 1970 revisions. However, new abuses have surfaced that require modification of the rule governing protective orders.

B. CORRELATING THE CHANGES TO RULE 5 WITH THE RULES GOVERNING DISCOVERY

All the changes to discovery procedures were made with the intent to control costs and curb discovery abuse. Protective orders remain the proper mechanism for protecting privacy interests, but the 2000 amendment to Rule 5 filing requirements has stifled the purpose of this judicial mechanism. Prior to the gradual erosion of the filing requirement, the FRCP required, or at least permitted, the filing of a variety of discovery materials.¹³⁵ As such, making secrecy a condition of settlement agreements would have served little purpose because the damaging information would be on file with the court and readily available to the public.¹³⁶

Now that the filing requirement has been removed, this barrier has been eviscerated, and secret settlements have taken on a whole new meaning. Courts are no longer permitted to balance competing interest in the discovery context. Because “the [2000] revised Rule [5] *prohibits*

131. Marcus, *supra* note 116, at 162. This was partially triggered by an ABA recommendation to narrow discovery. *Id.*

132. *See id.* at 162.

133. *Id.* at 163.

134. *Id.* at 164.

135. FED. R. CIV. P. 5 (1992); *see* Moskowitz, *supra* note 83, at 851 (“The pre-2000 Rule required discovery materials to be filed unless exempted by the court . . .”).

136. *See* Moskowitz, *supra* note 83, at 838 (discussing pretrial discovery that is often implicated in secret settlement agreements).

discovery materials from being filed unless they are ‘used in a court proceeding,’” it effectively bars the general public from accessing information that may be of interest and that would have been publicly available—absent a protective order—before the revision.¹³⁷

However, even before the amendment, pretrial discovery information was not automatically available to third parties, nor could such information be used for any purpose. If requested by a party, courts considered whether good cause had been shown for a protective order under Rule 26(c) in determining the right of access to discovery materials.¹³⁸ Courts were properly charged with balancing the interests of parties with legitimate privacy or business concerns against the broader public interest in transparency in litigation.¹³⁹ Unfortunately, the need for this analysis has been eliminated by the amendment to Rule 5. Even worse, the Judicial Conference Committees have conflated the intent behind the filing requirement revisions with the role of Rule 26(c) protective orders. This error gives litigants the opportunity to shield important information from the public that should remain accessible when exchanged between parties.

Equally damaging, the 2000 amendment to the filing requirement gives legitimacy to the Judiciary Conference Committees’ erroneous conclusions about the underlying policy choices behind the amendments to the filing requirement. Litigants with incentive to shield information of interest to public health and safety will point to the now limited public access to discovery documents to support a presumption of privacy. While there may be legitimate reasons for limiting public access to the materials exchanged during discovery, the discussion should be based upon the true motivations of the drafting Advisory Committees and not a mistaken assumption. The notion that there is a policy restricting public access to discovery has no place in the debate.

C. THE SCOPE OF THE LEGISLATION

As a basic premise, parties to litigation are limited to resolving a controversy personal to them and are not permitted to litigate on behalf of the public at large, or even known third parties. Unless the plaintiff meets the constitutional standing requirements of injury, causation, and

137. *Id.* at 851 (quoting 1 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 5.33[2] (3d ed. 1997)). Technological advancements in the storage of electronic data nullify some of the storage and burden arguments used to support the revision to Rule 5. *See id.* at 876–77 (“Electronic filing improves judge, court staff, and public access to case files; decreases court costs through increased productivity and efficiency; reduces physical handling, maintenance, and copying of files; improves docketing, scheduling, case management, and statistical reporting; and enhances accuracy and efficiency in record maintenance.”).

138. FED. R. CIV. P. 26(c); Moskowitz, *supra* note 83, at 856.

139. Moskowitz, *supra* note 83, at 856.

redressability, or has a “close relationship” to right holder, and the third party right holder is unable to assert his or her own rights, the plaintiff cannot properly present grievances to the court.¹⁴⁰ This Note does not advocate for an expansion of the standing doctrine so that parties may litigate on behalf of others who are similarly situated. Individuals injured at the hands of another deserve their own redress, and the judicial process will adequately resolve disputes between parties on a micro-level. Rather, this Note argues in favor of removing some of the barriers to transparency in the pretrial litigation process. The restoration of mechanisms no longer in place will help potential litigants assert their rights more efficiently when they have been wronged through deliberate acts to conceal information relevant to public health and safety.

Moreover, defining the scope of information relevant to public health and safety in this context is simpler than some legal commentators make it out to be.¹⁴¹ The scope of the information can be equated to the legal principle used when determining whether or not something is “material” to a person’s decisionmaking process.¹⁴² Essentially, any information about a dangerous product or practice that would affect an individual’s choice, consumer or otherwise, because it poses a risk to their health and well-being satisfies the criteria for implicating public health and safety. The public has an unavoidable right to access this information as soon as it is exchanged in discovery, and no private agreement between litigating parties can or should be permitted to trump that basic power without demonstrating a significant reason to overcome it. Assuming this public right of access can be overcome, the need for privacy for individual litigants can be accommodated while still disclosing pertinent information to the public at-large. Accordingly, any settlement conditioned on the return of discovery materials and a vow of silence from the plaintiff should be closely scrutinized by the court to ensure that

140. See *Powers v. Ohio*, 499 U.S. 400, 414–16 (1991) (holding that requirements were satisfied to establish third-party standing to protect equal protection rights of potential jurors, and not those of the defendant, where prosecutors use peremptory challenges based upon race); *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (addressing who has standing to challenge prosecutors that use peremptory challenges based on race); *Craig v. Boren*, 429 U.S. 190, 196–97 (1976) (holding that beer vendors had standing to sue on behalf of eighteen- to twenty-one-year-old males prohibited from purchasing beer); *Barrows v. Jackson*, 346 U.S. 249, 259–60 (1953). But see *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (establishing that rights of hypothetical third parties may be asserted if law restricting speech is substantially overbroad); *Coates v. Cincinnati*, 402 U.S. 611, 614–16 (1971) (holding that picketers in a labor dispute who were arrested under a misdemeanor ordinance prohibiting “blocking sidewalks” were allowed to bring a facial challenge against the ordinance).

141. Marcus, *supra* note 13, at 20–21 (arguing that problems exist in determining when to apply closer scrutiny).

142. *Black’s Law Dictionary* defines “material” as: “Of such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.” BLACK’S LAW DICTIONARY 450 (3d pocket ed. 2006).

the judiciary is actively fulfilling its duty to the public interest as a whole, as well as to the individual litigants involved.

Even more important than remedying past concealment of dangers to public health and safety, the proposed legislation regulating settlement agreements and protective orders prevents these conditioned agreements from ever occurring in the first place. By eliminating the opportunity to enter into settlement agreements that allow litigants to bargain for silence surrounding a known danger, accountability will more or less be mandated for defendants once they become aware of a problem. Not only will they be liable for past wrongs, but also the public will demand that a known danger be corrected. Defendants will be forced to redress their wrongs, or risk that the public will abandon their product or practice in protest of their deception and/or complacency with an inferior product or injurious practice.

CONCLUSION

Proponents of restricted access to discovery materials rely upon the incorrect assumption that discovery is inherently private. This Note makes clear that restricted access to pretrial discovery has been an unintended consequence of amendments made to the FRCP since the 1970s and is not part of a larger scheme to shield discovery information from public view. Instead, information exchanged during pretrial discovery, whether filed or not, is *presumptively public* and should only be sealed upon proper showing from the parties. The Sunshine in Litigation Act addresses this problem and helps to restore the public's right of access to information exchanged during discovery.